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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 95M-141  
51582

In the Matter of ) WT DOCKET NO. 94-147  
)  
JAMES A. KAY, JR. )  
)  
Licensee of one hundred sixty )  
four Part 90 licenses in the )  
Los Angeles, California area )

MEMORANDUM OPINION AND ORDER

Issued: June 12, 1995 ; Released: June 14, 1995

PRELIMINARY STATEMENT

1. This is a ruling on a Motion For Partial Summary Decision that was filed on April 17, 1995, by James A. Kay, Jr. ("Kay").<sup>1</sup> The Wireless Telecommunications Bureau ("Bureau") filed its Opposition on May 1, 1995.

2. Kay asserts that the Bureau has failed to state any genuine issue of material fact with respect to six issues under Paragraph 10 of the Order To Show Cause, Hearing Designation Order And Notice Of Opportunity For Hearing For Forfeiture, FCC 94-147, released December 13, 1994 ("HDO"). The issues relate to determinations to be made on the record of an adjudicative hearing to determine:

- (a) whether Kay has violated Section 308(b) of the Communications Act of 1934, as amended ("Act") and §1.17 of the Commission's Rules by failing to provide information requested by the Commission staff [HDO at Para. 10(a)];
- (b) whether Kay has violated any of the Commission's construction and operation requirements [HDO at Para. 10(c)];

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<sup>1</sup> Kay simultaneously filed a Request For Permission To File Motion For Partial Summary Decision. The Commission's rules provide that any party may move for a summary decision on any or all issues set for hearing provided that the motion is filed at least 20 days prior to the date set for the commencement of the hearing. It is only when a party seeks to file within 20 days of the hearing that leave of the Presiding Judge is required. 47 C.F.R. §251(a)(1). The first hearing date in this case is set for October 24, 1995. Therefore, Kay's Request For Permission To File Motion For Partial Summary Decision is moot and it will not be considered.

- (c) whether Kay has abused the Commission's processes by filing applications in multiple names in order to avoid compliance with channel Commission [sharing and recovery] rules [HDO at Para. 10(d)];
- (d) whether Kay has interfered with radio communications of other systems [HDO at Para. 10(e)];
- (e) whether Kay has abused the Commission's processes in order to obtain cancellation of other licenses [HDO Para. 10(f)]; and
- (f) whether Kay's licenses have automatically cancelled as a result of violations of specified Commission rules [HDO Para. 10(h)].

3. Kay is the party having the factual information regarding the construction and operation of the 164 broadcast facilities that were licensed to him by the Commission. Kay must establish a factual record based on substantial evidence regarding the manner in which he has constructed and operated his stations. It is only such a complete factual record that can be used to support the motion. Otherwise, the decision would be made without considering genuine issues of material fact. For reasons stated below, after considering the assertions and arguments of Kay and the Bureau as set forth in pleadings, after a review of the HDO and the response of the Bureau to Kay's interrogatories,<sup>2</sup> and in light of the current state of discovery,<sup>3</sup> there are found to be substantial issues of material fact which remain to be resolved. Therefore, partial summary decision on any and all of the above issues must be denied at this time.

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<sup>2</sup> The Presiding Judge authorized ten interrogatories on each issue as a form of "limited discovery [which] was to provide Kay with more particularized specifications and to facilitate his preparation for trial." It was not intended to require the Bureau to "delineate the universe of its evidence and trial theories." Order FCC 95M-102, released April 7, 1995.

<sup>3</sup> It appears based on Bureau motions to compel discovery, Kay has failed to fully disclose the facts of his business documents and to provide full and complete answers to the Bureau's interrogatories. Because the deposition of Kay is to be taken only after the completion of the document discovery, the record is not now in a proper posture for considering a summary decision on any of the issues. In addition to determining objective facts and events which require full and complete document production and full and complete answers to interrogatories, there are related issues of wilfulness, maliciousness and repeated conduct which must await a full discovery record and an opportunity to observe demeanor in testimony elicited in open court.

## FACTS AND ARGUMENTS

### Failure To Respond To Inquiry (HDO Para. 10(a))

4. Kay seeks a ruling that as a matter of law he did not violate either §308(b) of the Communications Act of 1934, as amended (the "Act"), or §1.17 of the Commission's rules [47 C.F.R §1.17]. Section 308 of the Act provides:

The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

The Commission has adopted a related rule that authorizes the obtaining of information from licensees by "written statements of fact relevant to a determination --- whether an application should be revoked." See 47 C.F.R. §1.17. The rule also prohibits any misrepresentation or wilful material omission in the licensee's response. Id.

5. Kay denies that the Act or the Rule imposes any duty to respond to a Commission inquiry.<sup>4</sup> Kay argues that the only obligation imposed on a licensee is the duty specifically imposed by the Act and §1.17 to answer an inquiry truthfully. It is determined as a fact that the HDO was issued by the Commission to determine whether Kay's FCC licenses should be revoked. It is also found as a fact that the Bureau's letter dated January 31, 1994, presumed to have been duly mailed and received, was sent to Kay pursuant to §308(b) and §1.17, and that Kay was so informed in that letter. The statements were sought from Kay for the purpose of considering revocation and as a licensee, and Kay had a duty to respond. See Warren L. Percival, 8 F.C.C. 2d 333, 334 (Comm'n 1967) (Commission revoked license for wilful violation of §308(b)). It remains to be determined by substantial evidence that Kay understood what was requested and that he wilfully failed to submit the information. These are genuine issues of material fact which cannot be determined summarily at this time.

6. If the Presiding Judge were to grant summary relief that resulted in a dismissal of the charges against Kay based on Kay's theory that he had no obligation to provide responsive information, it would be in the nature of a modification of the HDO which is beyond the authority of the Presiding Judge. It has been held that any relief sought which is in the nature of a request to change or modify a Commission hearing designation order is beyond the authority delegated to a Presiding Judge. See Atlantic Broadcasting Company,

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<sup>4</sup> Kay argues that "Section 308(b) is not a statute which an applicant or licensee can violate." That proposition cannot be accepted.

5 F.C.C. 2d 717, 721 (Comm'n 1966); Frank H. Yemm, 39 Radio Reg. 2d (P&F) 1657 (Comm'n 1977); and Fort Collins Telecasters, 103 F.C.C. 2d 978, 983-84 (Review Bd 1986).<sup>5</sup> These authorities present an additional reason to deny the motion apart from the merits.

7. Kay argues that there are no genuine issues of fact to litigate for a failure to respond to Bureau inquiries because the Bureau had not identified such facts in its responses to Kay's interrogatories. Kay relies on a ruling by the Presiding Judge that the Bureau's interrogatory responses which referred to and provided copies of letters of complaint had provided complete answers. Because there was no narrative of facts iterated by the Bureau, Kay contends that there are no genuine issues of fact to litigate. Kay's argument is erroneous because it fails to take into account the limited interrogatory discovery that was authorized for Kay. See Order FCC 95M-102, supra (interrogatory discovery by Kay of the Bureau was not intended to delineate the universe of the Bureau's evidence or its trial theories). On order of the Presiding Judge, the Bureau had provided additional information to Kay in order to give Kay more precise notice of the charges. However, the universe of facts regarding Kay's alleged failure to respond to the Bureau inquiry and the facts with respect to the questions posed in that inquiry are within the knowledge and control of Kay and/or Kay's agents. Thus, there remain substantial genuine issues of fact which can only be resolved after the completion of discovery and a hearing on the record.<sup>6</sup>

#### Construction And Operation Requirements

(HDO Para. 10(c))

8. The HDO alleges that the Commission has received complaints which assert that Kay may have constructed or deconstructed without authorization from the Commission. The Bureau has responded in its answers to a Kay interrogatory that there were at least eighteen documented relevant complaints, copies of which were attached to the answer. There were five identified sources for the allegations of operational violations. There were ten complaints identified which concern the mobile loading of Kay's stations. Kay asserts that the Bureau failed to specify any station of Kay's which was not constructed or which was deconstructed. Again the Bureau is stymied

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<sup>5</sup> These cases were discussed previously by the Presiding Judge in Memorandum Opinion and Order FCC 95M-24, released January 30, 1995 at Para. 3.

<sup>6</sup> The letter of January 31, 1994, was addressed to Mr. Kay. The inquiry was based on letters of complaint alleging that Kay had no permits for facilities that were on U.S. Forest Service properties. The complaints also questioned the loading and use of Kay's licensed communications facilities. The Bureau asked for information that would be known to Kay concerning (1) call signs and licenses, (2) dates of the grants of the call signs and construction dates, (3) copies of the U.S. Forest Service permits, (4) reasons for facilities having been built without a Forest Service permit, (5) user lists of the stations, and (6) number of units operated on each station. The inquiry asked for information, the details of which should be within the knowledge or control of the licensee. The furnishing to Kay of the letters of complaint substantiates the basis for the letter of inquiry and the basis for the allegations of the HDO. But such limited discovery does not provide the facts which are needed to resolve the issues in this case.

because Kay had not responded to the Bureau's request under §308 for answers to establish Kay's compliance with the rules. Kay also asserts that the Bureau has failed to identify a complaint which supports any charge of falsely reporting the number of mobile units. Kay argues that because the Bureau had not identified any of the effected stations in its answer to the interrogatory it could be concluded as a matter of fact and law that there were no violations of the Commission's regulations regarding the use of licensed broadcast stations. The Bureau provided only the information that it had received from the complaints. For the additional reasons stated in Paragraph 3 above, Kay is found to have failed to carry his burden on the issue.

Filing Applications In Multiple Names

(HDO Para. 10(d))

9. Kay argues that the Bureau has failed to provide any factual information in response to Kay's interrogatories. Kay admits that the Bureau provided only information about several of the names under which Kay conducted business under a number of different names. (E.g. Southland Communications, Lucky's Two Way Radios, Buddy Corp., and Oat Trucking Group.) Kay also acknowledges that the Bureau provided copies of complaints. Kay contends that since the Bureau had failed to provide in discovery "relevant facts concerning each instance in which Kay is alleged to have filed applications in multiple names" that Kay is now entitled to a summary decision on the issue in his favor. But Kay's argument overlooks the fact that the burden is not on the Bureau to present its proof on each element of the issue in order to defeat the motion. The burden is on Kay to show that there is no genuine issue of fact and that he is entitled to a favorable decision as a matter of law. For the additional reasons stated in Paragraph 3 above, Kay is found to have failed to carry his burden on the issue.

Communications Interference

(HDO Para. 10(e))

10. Kay argues that the Bureau has responded to interrogatory questions regarding this issue by referring to twelve identified documents, copies of which were furnished to Kay. The documents were the complaints of other persons in the industry who would be in positions to know whether there had been interference. The Bureau also referred Kay to relevant documents in another proceeding to which Kay is a party. Kay would have the information about the circumstances of any interferences and those facts would need to be disclosed by Kay before there could be consideration of a motion for summary decision on the issue.<sup>7</sup> For the additional reasons stated in Paragraph 3 above, Kay is found to have failed to carry his burden on the issue.

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<sup>7</sup> If there were interferences that occurred which are attributable to Kay or to Kay's operations, it will be necessary to learn of Kay's knowledge of the facts and circumstances because §333 of the Act has elements of wilfulness or maliciousness.

Abuse Of Process To Obtain License Cancellations

(HDO Para. 10(f))

11. The Bureau was asked to answer questions concerning allegations of inducing persons to sign blank FCC forms and misappropriation of customers' licenses. Kay argues that the Bureau has responded to interrogatory questions regarding this issue by referring to six identified documents, copies of which were furnished to Kay. The documents were the complaints of other persons in the industry who would be in a position to know whether there had been conduct of abuse of process to obtain license cancellations. Kay would need to respond to the assertions in those complaints and establish facts relevant to those complaints that would require the rejection of the allegations. Also, for reasons stated in Paragraph 3 above, Kay is found to have failed to carry his burden on the issue.

Automatic Cancellation Of Licenses

(HDO Para. 10(h))

12. Kay believes that he is entitled to a summary decision on the issue of whether any of the conduct alleged in the issues would constitute a basis for the automatic cancellation of Kay's licenses. Kay has requested the Bureau to identify each license that has qualified for automatic cancellation. The Bureau properly responded that the purpose of this proceeding is to determine which, if any, of Kay's licenses is automatically cancelled for violations of Commission rules. Unless the parties are to stipulate as to the licenses and the grounds for cancellation, there is not a sufficient record established in this case to grant summary decision on this issue. Also, for reasons stated in Paragraph 3 above, Kay is found to have failed to carry his burden on the issue.

**CONCLUSIONS**

13. The Commission's rules provide that in considering a motion for summary decision:

The party filing the motion may rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §1.251(a)(1). As the moving party, Kay has the burden of establishing that summary decision would be appropriate based on his papers. Summary Decision Procedures, 34 F.C.C. 2d 485, 487-88 (1972). Kay has not filed his own affidavit or any supporting affidavit. Kay has relied primarily on the answers of the Bureau to Kay's interrogatories. But Kay fails to respond to the underlying fact presented in the Bureau's interrogatory

response that it is because Kay had failed to respond to the Bureau's request for facts to establish compliance with Commission's rules that the Commission designated the issue.<sup>8</sup>

14. In order to obtain a favorable summary decision, Kay has the burden to establish that the truth is clear, that the basic facts are undisputed, and that there is no reasonable disagreement on the factual inferences to be drawn from the facts. Big Country Radio, Inc., 50 F.C.C. 2d 967 (1975). Kay has failed to meet those standards. The facts about construction and operation of the 164 stations that are licensed to Kay are peculiarly within the knowledge of Kay and his agents. Yet there has been no affidavit offered by Kay in support of his motion. The answer to the allegations against Kay of those who submitted letters of complaint need to be furnished by Kay before he can be considered for a summary ruling. Nor has there been any depositions taken or business documents submitted which might offer a record on which findings could be made and reasonable inferences drawn. Kay offers little more than his criticisms of the scope of the Bureau's responses to his interrogatories which were permitted to be asked for a limited purpose of giving more detailed notice to Kay of the charges to be met in the hearing.<sup>9</sup> Rather than attempting to fashion summary relief based on the Bureau's limited disclosures of investigatory and discovered facts at a preliminary stage of the case, Kay should address specifically the allegations in the HDO including those facts with respect to his alleged failure to provide answers to the Bureau's questions under §308 of the Act.

15. The Commission has noted the ultimate penalty for holding back information to which the Bureau is entitled:

While information which is self-incriminatory may be withheld, the licensee, in doing so frustrates the Commission in the performance of its duty. In such event, denial or revocation of a license where such information is not furnished may be warranted on this ground alone, since it is the licensee who deprives the Commission of information necessary to determine its compliance with the public interest standard---.

Carol Music, Inc., 37 F.C.C. 379, 383-84 (1964). There has been no withholding of information based on any claim by Kay of a Fifth Amendment self-incrimination privilege. There cannot be findings made on the record thus far advanced by Kay which can only support surmise and innuendo. There must be a record established that is based on Kay's business records and testimony from Kay and witnesses having direct knowledge of the facts.

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<sup>8</sup> For example, a review of the Bureau's response to Interrogatory 2-5 also discloses that the Commission has information for which the Bureau asserts the informers' privilege. And the circularity conundrum created by Kay's failure to respond to the §308 letter Kay continues in Interrogatory 3-4 where the Bureau states and identifies relevant complaints by persons in the industry. Kay also has not furnished the relevant information which has been requested under the Act related to allegations of inflated loading which are in his possession or control.

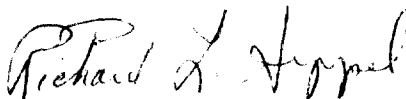
<sup>9</sup> See Presiding Judge's Order FCC 95M-102, supra.

Significant facts are within the possession and control of Kay but they have not yet been set forth. Therefore, the case must go forward to determine at hearing the facts and circumstances of the alleged failure of Kay to respond to the letter of January 31, 1994, and the facts and circumstances of the other charges of the HDO including the alleged failures to meet construction and operation rules, filing applications in multiple names, interferences with broadcast communications, abuses of process in obtaining cancellation of licenses, and whether licenses of Kay should automatically be cancelled.

**ORDER**

Accordingly, for the reasons stated above, the Motion For Partial Summary Decision that was filed by James A. Kay, Jr. on April 17, 1995, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "Richard L. Sippel".

Richard L. Sippel  
Administrative Law Judge